

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

IN THE MATTER OF:)	
)	
LAWRENCE SIMMS,)	
)	Charge No. 2007CN0599
Complainant,)	ALS No. 07- 582
)	
and)	
)	
VILLA ST. BENEDICT,)	
)	
Respondent.)	Judge Reva S. Bauch
)	

This matter comes before the Commission on Respondent's Motion for Summary Decision ("Motion"). Complainant filed a Response. Respondent filed a Reply. Accordingly, this matter is now ripe for a decision.

Findings of Fact

1. In November 2005, Respondent advertised an open position for a Sous Chef.
2. Respondent received approximately twenty (20) applications for the position.
3. Carrie Tuma, Respondent's Human Resources Specialist, identified eight (8) applicants which she deemed best suited for the position.

4. Complainant was one of the eight (8) applicants contacted for an initial interview.
5. On November 28, 2005, Tuma interviewed Complainant.
6. The interview was favorable.
7. Following the first round of interviews, Tuma recommended Complainant, Roberto "Carlos" Carrasco, and Mario Radilla for a second round of interviews.
8. On December 7, 2005, Complainant was interviewed by Ranjeet Viswanathan, the Director of Dining Services, and John Siran, the Executive Chef.
9. On December 12, 2005 Tuma informed Complainant that he would not be offered the position of Sous Chef.
10. In response to the news that he was not chosen, Complainant alleged that he had been subjected to discriminatory treatment by Siran during his December 7, 2005 interview.
11. Complainant alleges that Siran did not shake his hand before or after the interview.
12. Complainant alleges that during his interview, Siran asked him a discriminatory question: "Do you know how to make chicken noodle soup?"
13. Tuma immediately began an investigation by contacting her supervisor, Jo Jerak, the Director of Human Resources.
14. On December 14, 2005, Jerak contacted Complainant to discuss the alleged discriminatory treatment.
15. The subsequent investigation that followed revealed that Complainant's allegations were without merit.
16. Complainant's resume revealed several short-term employments.
17. Complainant mispronounced several culinary terms and kitchen jargon during his interview.

18. Complainant's most recent employment before the interview was a demotion from his previous job.
19. Radilla had been at his previous position for sixteen (16) continuous years.
20. Radilla had experience with bulk cooking.
21. Radilla had previous supervisory experience.
22. During his interview, Radilla had shown initiative by introducing himself to residents and kitchen staff.
23. Respondent believed Radilla had better qualifications than Complainant.
24. On December 12, 2005, Tuma sent Complainant a letter informing him that the position would be going to Radilla.
25. Prior to learning of the decision, Complainant had several conversations with Tuma.
26. In those conversations, Complainant never mentioned any concern with discriminatory statements.
27. After Complainant was not offered the position, he filed a charge of discrimination based on race.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), **775 ILCS 5/1-103(B)** and **5/2101(B)**.
2. The Commission has jurisdiction over the parties and the subject matter of this action.
3. Complainant failed to establish a *prima facie* case of race discrimination.
4. Respondent has articulated a legitimate, nondiscriminatory reason for its actions.
5. Complainant has failed to show that Respondent's reason is a pretext for discrimination.

Discussion

I. Sanction Order

On February 3, 2009, Judge McCarthy entered an Order directing Complainant's Counsel to pay \$800.00 in legal fees to Respondent's law firm for his failure to participate in the September 30, 2009 settlement conference in good faith. That order is now incorporated by reference. I recommend that the Commission affirm Judge McCarthy's February 3, 2009 Order.¹

II. Standards for Summary Decision

Under Section 8-106.1 of Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1**. See also **86 Ill. Admin. Code §5300.735**. A summary decision is the administrative agency procedural analog to the motion for summary judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill. App.3d 130 (1993)**. Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill. App.3d 386 (1994)**. The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herrschner v. Xttrium Lab. Inc., 26 Ill. App.3d (1969)**. All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill. App.3d 453, (1979)**. If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill. App.3d 482 (1990)**. Where the facts are susceptible to two or more inferences,

¹ Complainant's counsel spent a great deal of time in Complainant's Response to this Motion addressing his concerns with Judge McCarthy's Sanction Order. Since I was not the Judge who granted the Sanction Order, I cannot reconsider it. Complainant's counsel may file exceptions to this Recommended Order and Decision on the subject of sanctions for a Commission Panel to address.

reasonable inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc.**, 209 Ill. App.3d 519 (1991). Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy**, 241 Ill. App.3d 119 (1993). Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen**, 208 Ill. App.3d 881 (1992). If a Respondent supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a Complainant may not rest on his/her pleadings to create a genuine issue of material fact. **Fitzpatrick at 392**. Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp.**, 289 Ill. App.3d 410 (1997). Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and free from doubt. **Purtill v. Hess**, 111 Ill.2d 229 (1986).

III. Analysis

In support of its Motion, Respondent offers two major arguments to show that there is no issue of material fact regarding whether Complainant was subjected to racial discrimination. In its first argument, Respondent contends that it cannot be held liable for John Siran's actions during the interview in question because Siran is not an employee. Thus, he cannot be considered to have acted as Respondent's agent.

There is no rigid rule for determining whether an agency relationship exists. **Simich v. Edgewater Beach Apts. Corp.**, 368 Ill. App.3d 394 (2006). The difficulty in establishing whether or not an agency relationship exists is evident by disputes on the issue among courts. In support of its argument, Respondent relies on the interpretation discussed in **Jarmon**, where the Court held that an employer can only be liable for the

acts of non-employees where the employer should have known of the conduct and fails to take immediate and appropriate corrective action. **Jarmon v. City of Northlake, 950 F.Supp. 1375 (N.D. Ill. 1997).**² However, in **Elmore**, the Court held that, in situations without direct evidence of agency, a *prima facie* case can be established by inference or presumption. **Elmore v. Blume, 31 Ill. App.3d 643 (1975).** The **Elmore** Court goes on to hold that an agent's authority may be presumed from the silence of an alleged principal when he knowingly allows another to act for him, and that if evidence shows one acting for another under circumstances implying knowledge of the acts on the part of the alleged principal, a *prima facie* case of agency is established. **Id.** In general, the questions of whether an agency relationship exists, as well as the scope of the purported agent's authority, are questions of fact. **Amigo's Inn, Inc. v. License Appeal Comm'n, 354 Ill. App.3d 959 (2004).**

In this case, the facts do not clearly indicate whether or not there is an agency relationship. As such, granting the Respondent's Motion based on its first argument is inappropriate. Notwithstanding the forgoing, Respondent's other arguments for granting its Motion are more persuasive. Respondent argues that, even if there is a basis for liability on behalf of Respondent, Complainant cannot establish that he was not hired for the Sous Chef position because of race.

There are two main methods to prove an employment discrimination case, direct and indirect. Either one or both may be used. **Sola v. Human Rights Comm'n, 316 Ill. App.3d 528 (2000).** Under the direct method approach, a complainant may present either direct or circumstantial evidence that the employer's adverse employment action was motivated by an impermissible purpose. **Bd. of Ed. of City of Chicago v. Cady, 369 Ill. App.3d 486 (2006).** Direct evidence essentially requires an admission by the

² The Commission and Illinois Courts may consider analogous federal cases arising under federal discrimination statutes in deciding issues arising under the Act. **Hoffelt v. Ill. Dept. of Human Rights, 367 Ill. App.3d 628, 634 (2006).**

decision-maker that his actions were based on the prohibited animus. **Radue v. Kmberly-Clark Corp.**, 219 F.3d 612 (7th Cir. 2000); *see also* **Elius Reed and Painter's Local No. 32**, IHRC, S-10289, Oct. 4, 2000. Contrary to Complainant's assertions, there is no direct evidence in this case. In addition, a complainant may proceed under the direct method with circumstantial evidence. The evidence must still do more than create a permissible inference of discrimination; it must present a convincing mosaic of evidence regarding the decision-makers. **Bonita Welch and Appellate Court of Ill. Third Dist., et al**, IHRC, S-10644, Sept. 30, 2004 "*rev'd on other grounds*" 322 Ill. App.3d 345 (2001). The circumstantial evidence must point directly to a discriminatory reason for Respondent's actions. **Petts v. Rockledger Furniture LLC**, 534 F.3d 715, 720 (7th Cir. 2008). Complainant's reliance on an alleged awkward handshake and his feeling that he was discriminated against is not sufficient. **Karazanov v. Navistar Intern. Transp. Corp.**, 948 F.2d 332, 337 (7th Cir. 1991) (upholding summary judgment in favor of defendant where the plaintiff alleged, via the direct method, he had a "gut feeling" that he had been discriminated against). In addition, Complainant's allegation that Tuma, Respondent's Human Resources Specialist, was unable to answer his demand for statistics on the number of black employees working at Respondent is not helpful for a few reasons. First, Tuma was not the decision-maker. Second, this interaction between Complainant and Tuma does not point to discrimination. Tuma would have no reason to have this statistical information at her fingertips when she informed Complainant of the hiring decision. As such, the direct method is inappropriate, and the indirect method shall be used to analyze this case.

The method of proving a charge of discrimination through indirect means was described in the U.S. Supreme Court case of **McDonnell Douglas Corp. v. Green**, 411 U.S. 792 (1973), and is well-established. First, the Complainant must establish a *prima facie* showing of discrimination against him by Respondent. If he succeeds in doing so,

Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. **See also Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).** This method of proof has been adopted by the Illinois Human Rights Commission ("Commission") and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172 (1989).**

In general, to establish a *prima facie* case of race discrimination in a failure to hire situation, the Complainant must prove: (1) he is in a protected class; (2) he applied for and was qualified for the job; (3) despite those qualifications, he was rejected for the job; and (4) a person who was not a member of the Complainant's protected group was hired with similar or lesser qualifications for the job as compared to the Complainant. **Elius Reed at 11.**

I find that Complainant has failed to establish a *prima facie* case for race discrimination. In particular, Complainant fails to establish that a person who was not a member of Complainant's protected group and had similar or lesser qualifications was hired over him.

Following the interviewing process, Respondent hired Mario Radilla to the position of Sous Chef. Complainant provides no evidence showing that he was equally or more qualified for the position than Radilla. In fact, in his response, Complainant fails to address Radilla at all. Accordingly, Complainant seems unable to establish a *prima facie* case of race discrimination.

Whether or not Complainant has demonstrated that he can establish a *prima facie* case for his race discrimination claims, however, is not fatal. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that

point, the decisive issue in the case becomes whether the articulated reason is pretextual. **Clyde and Caterpillar, Inc., 52 Ill. H.R.C. Rep. 8 (1989), *aff'd sub nom Clyde v. Human Rights Comm'n*, 206 Ill. App.3d 283 (1990).**

Respondent has articulated a legitimate, non-discriminatory reason for hiring Radilla instead of Complainant. Respondent argues that Radilla was more qualified for the position than Complainant. Respondent offers several reasons to support its position that Radilla was more qualified. Respondent points to Radilla's more steady work history, his knowledge of fine dining, and his excellent rapport with the residents and kitchen staff. Respondent submitted a number of sworn affidavits to support its articulated reason for its decision. For example, Respondent submitted the affidavits of Carrie Tuna, Ranjeet Viswanathan, John Siran and Jo Jerak. It also submitted the Complainant's and Radilla's resumes and applications, as well as Tuma's notes about the interviews and decision. Tuma's letter notifying the Complainant of Respondent's decision also supports its position. These affidavits and documents indicate that: (1) Complainant's resume revealed several short-term employments; (2) Complainant mispronounced several culinary terms and kitchen jargon during his interview; (3) Complainant's most recent employment before the interview was a demotion from his previous job; (4) Radilla had been at his previous position for sixteen (16) years; (5) Radilla had experience with bulk cooking; (6) Radilla had previous supervisory experience; and (7) during his interview, Radilla had shown initiative by introducing himself to residents and kitchen staff. In sum, Respondent supports its position that it honestly believed Radilla had better qualifications than Complainant.

Once Respondent has articulated a reason, the burden then shifts back to Complainant to prove that the reason was a pretext for discrimination. **Clyde at 293.** To show pretext, a complainant must offer evidence to show that the respondent's explanation is not worthy of belief or by offering evidence that a discriminatory reason

more likely motivated the respondent's actions.³ **Burnham City Hosp. v. Ill Human Rights Comm'n**, 126 Ill. App.3d 999 (1984). Further, a complainant may discredit an employer's justification for its actions by demonstrating that the proffered reasons have no basis in fact, the proffered reasons do not actually motivate the decision, or that the proffered reasons were insufficient to motivate the decision. **Grohs v. Gold Products**, 859 F. 2d 1283 (7th Cir. 1988). Complainant can fulfill his burden of proof if he can show that the employer's proffered reasons are not believable or raise genuine issues of fact as to whether a respondent discriminated against a complainant. **Gomez v. The Finishing Co., Inc.**, 369 Ill. App.3d 711 (2006).

More specifically, under these facts, Complainant must show that Radilla's credentials were so inferior to those of the Complainant that Respondent's articulated reason for selecting Radilla is not believable. **Berry and the SOI, Dept. of Mental Health and Developmental Disabilities**, IHRC, S-9146, Dec. 10, 1997. Here, Complainant has failed to address the Respondent's articulated reason completely, and therefore, fails to satisfy his burden. In addition, Respondent submitted several affidavits to support its position, as well as other documentation. Complainant failed to contradict the facts contained in the affidavits with counter-affidavits. Failure to submit counter-affidavits can be fatal. **Supra, Rotzoll at 7**. Because Respondent's affidavits stand uncontradicted, the Commission must accept, as true, the facts contained therein. **Id. at 416**.

³ It should be noted, however, that it does not matter whether a respondent's stated nondiscriminatory reason and action in terminating a complainant is correct, but rather whether it is the true ground of Respondent's action rather than a pretext. **Forrester v. Rauland-Borg Corp.**, 453 F.3d 416 (7th Cir. 2006).

Recommendation

Based on the foregoing, Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed, with prejudice, and that Complainant's counsel be ordered to pay Respondent's law firm \$800.00 for legal fees as a sanction in accordance with Judge McCarthy's previous order.

HUMAN RIGHTS COMMISSION

BY:_____

**REVA S. BAUCH
DEPUTY ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION**

ENTERED: August 20, 2009